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No. 464 MISC.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

LOIS T. SCHOLLA as Next Friend of her son Paul Frederick Scholla, Jr., and her daughter Barbara Jean Scholla, minors, Petitioner,

v.

PAUL F. SCHOLLA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Lois T. Scholla, petitioner, and appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on January 8, 1953.

Opinions Below

The judgment of the United States District Court for the District of Columbia was entered on October 30, 1951. Its opinion (R. 41-44) is unreported. The opinion of the Court of Appeals (R. 46-58) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 8, 1953 (R. 59). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether a foreign diverse decree containing provisions relating to a father's obligation for support of his children precludes, by reason of res judicata and full faith and credit, an independent equitable action for their maintenance in the jurisdiction where the father is presently domiciled.

Statutes Involved

United States Constitution, Article IV, Section 1, provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Florida Statutes (1941) section 65.14 provides:

> "In any suit for divorce or alimony, the court shall have power at any stage of the cause to make such orders touching the care, custody and maintenance of the children of the marriage, and what, if any, security to be given for the same, as from the circumstances of the parties and the nature of the case may be fit, equitable and just, and such order touching their custody as their best spiritual as well as other interests may require."

11 District of Columbia Code (1951), section 306, provides:

> "Said court [i.e., the United States District Court for the District of Columbia] shall have cognisance * * * of all cases in law and equity between parties, both or either of which shall be resident or be found within said district * * *."

Statement

This is an action for maintenance of minor children, brought by them, in the United States District Court for the District of Columbia, through their mother as next friend. In that capacity she is petitioner here. The children and their mother are domiciled in Florida (R. 17). They are presently living in Virginia, and were when the action below was commenced (R. 4). Respondent (herein sometimes called the "father") is the father of the children. At the time the action was instituted he was domiciled in the District of Columbia and engaged in business here (R. 4, 5, 10). He admits to an annual income of ten thousand dollars (R. 10). Apart from his payments, the children, their mother and grandmother (petitioner's mother) are dependent on the mother's earnings (R. 5). The grandmother lives with them and looks after the children when the mother is working (R. 5).

The mother and father were husband and wife until May 20, 1949, when the mother was awarded an absolute divorce by the Circuit Court of Lee County, Florida (R. 7). In the decree she was awarded custody of the three children of the marriage. The father was ordered to pay two hundred and fifty dollars ($250) per month for her support and that of the children (R. 8). Since November, 1949, the eldest child, who is now seventeen years of age, has been living with the father (R. 4, 13). The other two children, Paul Frederick, Jr., eight years of age, and Barbara Jean, seven years of age, live with their mother (R. 4, 11, 15).

In January and February, 1951, the father made no payments for the support of the children or their mother (R. 4). Being practically without funds the mother brought this action seeking an order from the District Court requiring the father to support the two children living with her, and judgment for the amount of support which was in arrears (R. 4, 5). On April 9, 1951, the District Court ordered the father to pay one hundred and fifty dollars ($150) per month for the support of the children, pendente lite (R. 37). On October 30, 1951, the court granted the father's motion to dismiss the action for lack of jurisdiction over the subject matter (R. 41).

On November 28, 1951, the District Court granted petitioner's application to proceed on appeal in the United States Court of Appeals for the District of Columbia Circuit, without prepayment of fees and costs and without giving security therefor (R. 31). On February 7, 1952, the Court of Appeals granted petitioner's motion to proceed in forma pauperis (R. 60).

On January 8, 1953, the Court of Appeals, by a divided court, affirmed the judgment of the District Court, not on the ground adopted by that court that it lacked jurisdiction of the subject matter (R. 48), but on the ground that the Florida divorce decree was res judicata and barred an independent action for maintenance in the District of Columbia (R. 48). Judge Washington dissented (R. 52-58).

Reasons for Granting the Writ

1. The Court of Appeals has not given proper effect to applicable decisions of this court, in a field of general importance. The decision below holds that equity courts of the jurisdiction where a divorced father is presently domiciled are without authority to compel him to support his children where a foreign divorce decree has already ordered him to do so. The majority opinion reasons (R. 50) that the divorce decree is entitled to full faith and credit and hence is res judicata, citing Yarborough v. Yarborough, 290 U.S. 202 (1933). The majority suggests that this result may possibly be avoided by pleading an intervening change of conditions (R. 49); but concludes that in the absence of that formality the only way to compel a migratory father to support his children in the District of Columbia is by legislation (R. 50).

As pointed out by Judge Washington in his dissenting opinion below (R. 58, n. 12), the diagrammatic reasoning of the majority opinion quite clearly overlooks the decision of this court in New York v. Halvey, 330 U.S. 610 (1947); cf. Industrial Commission v. McCartin, 330 U.S. 622 (1947). And in Yarborough v. Yarborough, 290 U.S. 202 (1933), relied on by the majority, this court expressly left open the question involved here, namely, the power of the courts in the jurisdiction of a divorced father's domicile to compel him to support his children notwithstanding a similar command in the divorce decree. This court there said:

> "We need not consider whether South Carolina would have power to require the father, if he were domiciled there, to make further provision for the support, maintenance, or education of his daughter." 290 U.S. 202, 213 (1933).

In New York v. Halvey, 330 U.S. 610 (1947), this court had before it the effect in another state of a Florida decree providing for custody of a child. After consideration of the Florida law, the court concluded that

> "custody decrees of Florida courts are ordinarily not res judicata either in Florida or elsewhere, except as to the facts before the court at the time of judgment. Miniek v. Miniek, 111 Fla. 469, 490, 491, 149 So. 483, 492." 330 U.S. at 613.

And this court expressly held, 330 U.S. at 613, that it may not be necessary to show a change of conditions since the rendering of the original decree, citing Meadows v. Meadows, 78 Fla. 576, 83 So. 392. There the Supreme Court of Florida held that

> "the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if the facts in issue could have been considered at a previous hearing, if such facts were not presented or considered at a former hearing." 83 So. at 393.

The physical needs of children, in relation to their father's ability to support them, change almost from day to day. Obviously the facts relevant to the needs of the children here, in 1951, in the metropolitan area of Washington, were not considered by the divorce court in Florida in May, 1949. No useful purpose could be served, we submit, by requiring such a proposition to be pleaded.

The Florida statute on which the Halvey decision was based is still in effect, see above, p. 2. It relates to maintenance as well as to custody of children.

2. The irrelevance of the ordinary rules of res judicata to questions involving maintenance and custody of children is indicated by the number of decisions throughout the country which have qualified the doctrine in such cases to the point of complete disregard. Representative cases of this type are cited in the dissenting opinion below (R. 55, 56, ns. 6, 7, 8). As pointed out by Judge Washington,

> "The Massachusetts Court in Durfee v. Durfee [293 Mass. 472, 200 N.E. 395 (1936)] did not consider res judicata or full faith and credit at all in making the new award. Compare Kaufmann v. Kane [275 App. Div. 715, 87 N.Y.S. 2d 81 (1949)] (the 'full faith and credit clause ... does not prevent consideration of the needs of the child and the circumstances of both parents and an award in accordance therewith')." (R. 56, n. 8)

The instant case itself was not briefed or argued, except very incidentally, as to res judicata; but rather as to the correctness of the view of the District Court that it lacked jurisdiction of the subject-matter (because of the non-residence of the children). And the unreality of the decision below is demonstrated by the

fact that it relegates these children to a remedy which the court below has expressly held to be an inadequate remedy. In Wedderburn v. Wedderburn, 46 App. D. C. 149 (1917), the court below held:

> "Unless such authority is exercised by the chancellor, the only way in which the obligations of this father toward his child may be enforced will be by a suit at law, where the rules are rigid and inflexible, where little consideration may be given to the surrounding circumstances of the parties, and where necessarily one suit must follow another. We think it quite apparent that the relief afforded by equity will be much more comprehensive, satisfactory, and just than would be possible in a court of law." 46 App. D. C. at 154.

The court reaffirmed this position in Emrich v. McNeil, 75 U. S. App. D. C. 307, 311, 126 F. 2d 841, 845 (1942). See, to the same effect, in other jurisdictions: Ostrander v. Ostrander, 190 Minn. 547, 252 N.W. 449 (1934); Guercia v. Guercia, 239 S.W. 2d 169 (Tex. Civ. App. 1951), aff'd 241 S.W. 2d 297 (1951).

It is submitted that the ineffectiveness of the remedy at law is clear. The children would be forced either to wait until arrearages of maintenance had accumulated to the extent of three thousand dollars before commencing suit in the District Court, or to sue monthly (or periodically) in the Municipal Court for the District of Columbia. The children could of course starve while waiting for three thousand dollars in arrearages to accumulate. Periodic suits in the Municipal Court would be a costly and wasteful procedure, resulting in an aggravated case of multiplicity of action. Only a local equity decree could be enforced by contempt proceedings; and only in an equitable proceeding could the children's immediate needs be provided for - by way of an order for maintenance pendente lite - as was done below, before the order of dismissal. Both by "weight of authority and on principle, a remedy at law which is practically ineffective is not an adequate remedy * * *". McClintock, "Adequacy of Ineffective Remedy at Law", 16 Minn. L. Rev. 233, 255 (1932).

3. The questions thus raised are of general importance and should be explicitly set at rest by this court. The District of Columbia has become recognized as a haven for divorced fathers seeking to avoid their obligation to support their children. The decisions of the court below contributing to this condition are largely cited in the dissenting opinion below, R. 52 -53.

To varying degrees the questions here involved are of course present in other jurisidctions as well. They have led to attempted remedies by way of legislation; see e.g., the Uniform Reciprocal Enforcement of Support Act, approved by the National Conference of Commissioners on Uniform State Laws in 1950, 9A Uniform Laws Annotated 59, and the Commissioners' Prefatory Note, id. at 39. However, there is no such legislation applicable to the District of Columbia; and, in any event, petitioner submits that no reason of public or judicial policy dictates that the federal (and District of Columbia) courts should be powerless in the premises.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Frederick A. Ballard

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April 8, 1953.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the District of Columbia has not been published in a reporter at this date. The opinion of the United States District Court for the District of Columbia is not reported.

JURISDICTION

The opinion of the United States Circuit Court of Appeals for the District of Columbia was entered on January

8, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the courts of one jurisdiction have the power to adjudicate cases involving prospective rights of domiciliaries of another jurisdiction, non-resident within its confines.

STATEMENT

The statement contained in the brief in support of the petition is substantially correct.

It should be noted, however, that the amount of the claimed overdue installments under the Florida divorce decree is $500.

ARGUMENT

The parents in this case were validly divorced outside of the District of Columbia. The Florida court which granted the divorce awarded custody of the children to the mother. The validity of the Florida decree is not questioned. The father is a resident of the District of Columbia. The children and their legal custodian are nondomiciliaries thereof resident in Virginia. This action was initiated subsequent to the Florida divorce.

Petitioner asserts that her action is one for maintenance of the children and is maintainable under Section 11-306, D. C. Code, because the father is a resident of the District of Columbia. *Schneider* v. *Schneider*, 78 U.S. App. D.C. 383, 141 F. 2d 542, indicates that domicile or residence of the child within the District of Columbia is a requisite element of such an action. There are no reported cases to the contrary. Therefore that ruling would seem to be binding on this Court. *Estin* v. *Estin*, 334 U.S. 541.

A study of the domestic relations cases cited by petitioner in her brief, as well as those cited by the lower court in its opinion, including *Schneider* v. *Schneider*,

supra, will show that in each case in which an order for custody or maintenance or any other prospective relief for a child is granted and the question of jurisdiction raised, the court's judgment awarding relief is bottomed upon a plainly stated finding that it has jurisdiction over the person of the child.

The *Guercia case* (239 S.W. 2d 169; Tex. Civ. App.) cited by petitioner is not in point. In that case prospective relief was not sought.

The compensation case cited by petitioner (*Industrial Commission* v. *McCartin*, 330 U.S. 622) likewise seems beside the point.

The Court below correctly held that the $500 debt claim was without the jurisdiction of the trial court. *Klepinger* v. *Rhodes*, 322 U.S. 734.

Insofar as the case at bar may be considered as having been bottomed upon a foreign divorce decree, there is no conflict in the holding of the Court below that the pecuniary provisions of divorce decrees of one jurisdiction are not prospectively enforceable in another jurisdiction. *Worsley* v. *Worsley*, 249 U.S. 725. *Yarborough* v. *Yarborough*, 290 U.S. 202.

In brief, petitioner maintains that one jurisdiction should be burdened with securing the maintenance of citizens of another jurisdiction non-resident within its borders. There is no authority for such a proposition.

The relief petitioner seeks can probably be provided by legislation, but it is beyond the judicial power to grant it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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